Supreme Court, U.S.
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89-64

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES WOODS TELEVISION CORP.,
Petitioner,

vs.

CAPITAL CITIES/ABC, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GARY R. CUNNINGHAM
(Counsel of Record)
DANIEL, CLAMPETT, LILLEY, DALTON,
POWELL & CUNNINGHAM
P. O. Box 10306 G.S.
Springfield, Missouri 65808
(417) 882-9600
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS FOR REVIEW

The Principal questions presented for review are,

I. WHETHER IN GRANTING AND AFFIRMING JUDGMENT N.O.V. FOR RESPONDENT THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENIED PETITIONER ITS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

II. WHETHER THE COURT OF APPEALS, IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT GRANTING ABC'S MOTION FOR JUDGMENT N.O.V., DISREGARDED THE EVIDENCE MOST FAVORABLE TO PETITIONER AND CREDITED AND RELIED UPON A COMBINATION OF SUPPOSED FACTS NOT IN EVIDENCE AND THE EVIDENCE LEAST FAVORABLE TO PETITIONER AND EFFECTIVELY DENIED PETITIONER ITS RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. WHETHER OR NOT THE COURT OF APPEALS TESTED THE VERDICT BY A COMBINATION OF SUPPOSED FACTS NOT IN EVIDENCE AND THE EVIDENCE LEAST FAVORABLE TO PETITIONER, RATHER THAN BY THE EVIDENCE MOST FAVORABLE TO PETITIONER, AND THEREBY SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT, EVEN IF THE SEVENTH AMENDMENT WAS NOT VIOLATED, AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION IS APPROPRIATE.

PARTIES TO THE PROCEEDING

The list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner to be included in Petition pursuant to Supreme Court Rule 28.1 are:

1. Charles Woods Television Corporation (the Plaintiff/Petitioner); and
2. Woods Communications Group, Inc.

TABLE OF CONTENTS

Questions for Review I
Parties to the Proceeding II
Table of Contents III
Table of Authorities IV
Opinions Below 1
Jurisdictional Statement 1
Constitutional Provision 2
Statement of the Case 2
Argument 8

Appendix—

District Court Opinion A1
8th Circuit Opinion A14
Denial of Motion for Rehearing A27

TABLE OF AUTHORITIES

Cases

Allison v. Mildred, 307 S.W.2d 447, 453 (Mo. 1957) 9
Bailey v. Central V.R., Inc., 314 U.S. 250 (1943) 22
Blessing v. Boy Scouts of America, 608 S.W.2d 484, 488 (Mo.App. 1980) 28
Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 804 (3d Cir. 1984) 8-9
Cantrell v. Superior Loan Corp., 603 S.W.2d 627, 636 (Mo.App. 1980) 24
Central Microfilm Service Corp. v. Basic/Four Corp., 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1191 26
Collier v. Roth, 434 S.W.2d 502, 506-07 (Mo. 1968) 28, 29
Curtis v. Kays, 670 S.W.2d 887, 893 (Mo.App. 1984) 9
Feeney v. Cook, 242 S.W.2d 524 (Mo. 1951) 9
Iseminger v. Holden, 544 S.W.2d 550 (Mo. banc 1976) 28
Jeck v. O'Meara, 122 S.W.2d 897, 903-04 (Mo. 1938) 23
Kerr v. First Commodity Corp. of Boston, 735 F.2d 281 (8th Cir. 1984) 26
Louis v. Andrea, 338 S.W.2d 96, 103 (Mo. 1960) 9
Lowenstein v. Pepsi Cola Bottling Co., 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976) 9
Lyon v. Mutual Ben. Health & Accident Assoc., 305 U.S. 484 (1939) 8
Manufacturers American Bank v. Stamatis, 719 S.W. 2d 64, 70 (Mo.App. 1986) 24
Meyer v. Clark Oil Co., 686 S.W.2d 836, 839-40 (Mo. App. 1984) 28
Presidential Properties, Inc. v. Canto, 615 F.2d 657 (5th Cir. 1980) 9

Slater v. KFC Corp., 621 F.2d 932 (8th Cir. 1980) 9
St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F.2d 1040 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 9
Total Petroleum, Inc. v. Davis, 788 F.2d 476 (8th Cir. 1986) 23
Weston v. American National Ins. Co., 32 S.W.2d 789, 791-792 (Mo. 1930) 24
Woodward v. Atlantic C.L.R., 57 F.2d 1019 (5th Cir. 1932) 22

Constitutional Provision

United States Constitution, Amendment VII 2, 8, 9, 22, 30

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinions below relevant to the judgment sought to be reviewed have not been reported, but they are included in the Appendix as,

(1) Order filed June 10, 1988, eleven (11) pages in length, of Hon. Russell G. Clark, District Judge, granting the after-trial motion of Defendant ABC for judgment n.o.v. or, alternatively, new trial; and

(2) The Opinion of the United States Court of Appeals for the Eighth Circuit, filed March 16, 1989, affirming the judgment of the District Court granting ABC's motion for judgment n.o.v.

JURISDICTIONAL STATEMENT

Woods sued ABC for fraud, seeking both compensatory and punitive damages in the Circuit Court of Greene County, Missouri. The action was removed by ABC to the United States District Court for the Western District of Missouri, Southern Division, which had jurisdiction under 28 USC Sections 1332 and 1441.

The case was tried to Honorable Russell G. Clark, and a jury, in Springfield, Missouri. The jury found in favor of Woods. Compensatory damages of $1.5 million and punitive damages of $2 million were awarded. On May 10, 1988, judgment was duly entered upon the verdict.

On May 20, 1988, ABC moved for judgment notwithstanding the verdict, or alternatively, for a new trial. By Order dated June 10, 1988, Judge Clark granted such relief.

Woods appealed the Order of June 10, 1988, and the judgment entered pursuant thereto, by Notice of Appeal filed on June 30, 1988.

The Eighth Circuit Court of Appeals had jurisdiction of the appeal under 28 USC Section 1291; Rule 3, FRAP; Rule 50, F.R.Civ.P., and by Order of March 16, 1989 affirmed the District Court. Woods filed a timely petition for rehearing or rehearing en banc which was denied by the Eighth Circuit April 20, 1989.

The Supreme Court had jurisdiction pursuant to 28 USC Section 1254(1) and Supreme Court Rule 17.

CONSTITUTIONAL PROVISION

The applicable constitutional provision is Amendment VII, Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

In January 1985, Charles Woods signed an agreement to purchase KMTC (KDEB) the Springfield ABC affiliate since 1966 (T. 136). (The transcript T. and V. references the trial court transcript and transcript of the videotaped depositions read at trial respectively, and the exhibit references are to trial exhibits, all part of the record on appeal before the Eighth Circuit.) In February 1985, Woods learned that Telepictures, who purchased independent KSPR in Springfield, was interested in the ABC affiliation (T. 105, 836), and would be al-

lowed to make a presentation. ABC executives testified ABC practice allowed any station owner to make a presentation (T. 858), that termination of an affiliate was contrary to industry custom and practice (T. 243-44), which ABC followed (T. 573-75, 606-07); and that such terminations were only in the rare and extreme situations where cause existed (T. 125, 145, 190-91, 575; V. 25-26, 136). On March 5, 1985, Woods wrote Richard Kozak, ABC's Vice-President in charge of Affiliate Relations, asking for ABC's "position" on KMTC keeping the affiliation (T. 107; Woods' Ex. 27). Kozak replied March 15, 1985, that he could not give ABC's "position" until after the presentations, which were scheduled for April 1985 (T. 109, 110, 861; Woods' Ex. 139).

ABC had an established "Affiliate Policy Manual" (hereinafter the "manual") for dealing with the affiliates (Woods' Ex. 1) which provides (p. 7) that after presentations, ABC will make and announce a decision "as soon as practicable" (T. 864). Following the April 1985 presentations, ABC repeatedly told Woods it would reveal its affiliation decision in the near future (T. 113, 122, 671-72). The manual defines the decision-making process on affiliation changes (Woods' Ex. 1, pp. 46, 51; T. 586). The Vice-President of Affiliate Relations gathers input from the Research Department (which deals with ratings), Broadcast Operations and Engineering (dealing with station technical facilities), Contract Administration (handling affiliation agreements), and Legal; then convenes ABC's "Affiliate Review Committee" to consider the matter; and finally brings a recommendation to the President of ABC Television Network, who makes the decision, after which subordinates prepare the agreement and put the affiliation relationship into operation (Woods' Ex. 1, pp. 46, 51; T. 586).

In May/June 1985, Newi (then ABC Television Network President) was the ABC executive empowered to

make the affiliation decision (Mandala, T. 240, 572, 586) (Kozak, T. 864-65) (Erlick, V. 21-22) (Newi, T. 274-75) (See, V. 162). Newi admitted that in May/June 1985, he concluded that ABC should change affiliates in Springfield (T. 274-75).

To elaborate, on May 21, 1985, Kozak convened a meeting of ABC's Affiliate Review Committee (hereinafter the Committee) (V. 170). Accounts of the May 21 meeting differed, but ABC produced no minutes or other documents reflecting what was discussed or decided (V. 182; T. 863), even though it was normal practice that agendas were issued, and minutes were to be taken and retained (T. 273, 863; V. 127-28, 144). Mandala (President of ABC Television) testified that in May 1985, the Committee *did* recommend changing affiliates in Springfield (T. 555, as compared to T. 579; see also Rosenblum, V. 129).

Kozak, who favored switching affiliates (T. 289), went to Newi in May 1985, presented the case for changing affiliates, and Newi concluded that the affiliation should change (T. 274-75, 702, 745). Under ABC's affiliate policies, when Newi concluded that the change should occur, the decision to switch affiliates was complete (T. 743-44; Woods' Ex. 1, pp. 46, 51).

No one at ABC told Woods that the Committee had met and recommended changing affiliates, or that Newi favored the switch or that Mandala favored the switch. Rather Woods was told no decision had been made (T. 146-47, 782-83, 876).

After ABC's outside legal counsel Frohock was consulted, Newi and Kozak went to Mandala (Newi's superior), who was outside the established affiliate decision-making hierarchy (T. 581-84, 586, 747), with the Committee's recommendation to switch affiliates, which

they supported (T. 244-45, 274, 591-92; See, T. 757). Mandala concurred in the decision (T. 245-46, 275, 294).

The executives then went even further outside the normal corporate channels and discussed the matter, with Everett Erlick (member of ABC's Merger and Acquisitions Committee [T. 585], Board of Directors Executive Committee, and General Counsel for the parent Corporation ABC, Inc.) (V. 1-2, 50, 179), which was not normal procedure (T. 867; V. 135). Erlick expressed concern that an "affiliate flap" could result (V. 10, 16), causing an "unnecessary glitch" in FCC approval of the ABC/Capital Cities merger (V. 16, 65-66). The Capital Cities/ABC merger was then in the critical approval stage (T. 470; Woods' Ex. 110-V). Newi testified that the impetus for the "deferral" was legal concerns about potential impact of the decision, and the effect of complaints by the parties upon FCC approval (V. 75-76; see also Marfoglia V. 65-66, 75-76). Kozak said the "deferral" occurred solely because of Erlick (T. 298-302, 870-71, 874-75). There were material conflicts in the testimony of ABC executives about the Mandala and Erlick meetings (Compare T. 702 with 753 with 760) (See also V. 10, 16, 65-66, 75-76; T. 594, 760, 871). Woods was never told of the Erlick meeting. Rather than tell Woods, Erlick instructed Kaufman to draft a letter to Woods, KMTC, and KSPR, for Kozak's signature, stating that the decision would be "deferred." (T. 247, 249-50). Newi, Mandala and others reviewed the letter (Woods' Ex. 53; T. 250, 704). Finally, Kozak signed and sent the letter June 20, 1985, outlining criteria on which the decision would be made (Woods' Ex. 54; T. 250).

The letter provided, in pertinent part,

> We have decided to defer a decision on future affiliation. . . This will allow time of the parties to construct any improvements in facilities with which

> they may elect to go forward and to make any changes which they may decide upon. It will also allow us to study the matter further. . . We will evaluate the situation again in early 1986 in light of all the facts and circumstances at that time.

Prior to receiving the June 20 letter, Charles Woods had repeatedly told ABC he would not close the purchase (T. 114-15, 119-20, 218-19) of KMTC until ABC made a decision (T. 324, 867). ABC had warned Woods that the affiliation could be in jeopardy and Woods heeded those warnings, and refused to close the purchase so long as ABC's position remained undefined (T. 120).

Kozak testified that he expected to and did receive telephone calls about the June 20 letter from Charles Woods (T. 849, 875). Woods testified that Kozak told him that ABC's decision would be based upon comparing (1) technical improvements, (2) operating changes, and (3) ratings (hereinafter the "criteria"), of the two Springfield stations during the "deferral period" (T. 122-23, 127, 219). Mandala verified these stated "criteria" were to be exclusive (T. 249-50), and Newi admitted the letter was designed to lead the stations to make major improvements (T. 784).

Woods had refused to close (V. 94), but the June 20 letter and subsequent phone conversations with Kozak induced Woods to change his mind and complete the purchase. He closed on July 17, 1985 (T. 121, 127). Woods felt that he could win a fair competition under the objective "criteria" (T. 219-25). Based upon ABC's representations, Woods closed the purchase of KMTC and spent millions of dollars improving the station after ABC specified the criteria upon which the decision would be made (T. 121, 127-29).

Woods negotiated a contingent price reduction, but he testified that he would have refused to purchase KMTC

had ABC not represented that no decision had been made and that the "criteria" would control the decision (T. 219, 225, 227, 249). Woods presented evidence of expenditures (T. 132-36, 347, 351-52) and damages, which vastly exceeded the contingent price reduction (T. 225, 368-69).

When on April 3, 1986, the affiliation switch was announced, the three "criteria" were not mentioned (T. 254). The Affiliate Review Committee *never* discussed the Springfield affiliation again after the May 21, 1985 meeting (even though the Committee did meet on other matters on April 2, 1986). And although ABC had told Woods its analysis would be confined to the two competing stations in Springfield—their "separate, individual merits"—unrelated to other markets (T. 123, 222, 224, 309), other markets were examined by ABC (T. 248, 257, 805). ABC admitted it did not go to Springfield during the so-called "deferral period" to ascertain what, if any, station improvements had actually been made (T. 316-18, 724, 730). Newi admitted that he did not know what changes were actually made (T. 276-79) and by inference, did not care.

Woods brought this civil suit in state court and ABC removed the action to the United States District Court for the Western District of Missouri. The basis for federal jurisdiction in the district court was 28 USC Sections 1332 and 1441, there being diversity of citizenship and a sufficient amount in controversy.

Woods' sole verdict-directing instruction submitted and specifically required the jury to find,

> First, Defendant represented to Plaintiff in May or June 1985 that Defendant had not decided to switch affiliates in Springfield, and
>
> Second, the representation was false, and
>
> Third, Defendant knew that it was false, and

Fourth, the representation was material to Plaintiff's purchase of KMTC and expenditures for technical and operating improvements, and

Fifth, Plaintiff relied on the representation in making the purchase and improvements, and

Sixth, as a direct result of such representation, Plaintiff was damaged.

In summary, Woods' evidence was that ABC actually made the decision to switch affiliates in May 1985; that ABC misrepresented that no decision had been made; that only the announcement of the decision was deferred; that Woods was intentionally mislead in order for ABC to avoid a "glitch" in the merger proceedings at the FCC.

The jury returned a $1.5 million compensatory damage and $2 million punitive damage verdict for Woods. The district court granted Respondent judgment n.o.v. and a three-judge panel of the United States Court of Appeals for the Eighth Circuit affirmed that judgment.

ARGUMENT

The Eighth Circuit Decision and the Seventh Amendment [Question I]

In affirming the judgment entered notwithstanding the verdict, the Court of Appeals' panel (1) misapprehended certain points of law and fact, and (2) overlooked the evidence most favorable to Petitioner and accepted and relied upon the evidence least favorable to Petitioner, thereby effectively denying Petitioner its Seventh Amendment right to trial by jury. *Lyon v. Mutual Ben. Health & Accident Assoc.*, 305 U.S. 484 (1939). (Constitutional right to trial by jury in suits at common law will be scrupulously safeguarded by the Supreme Court); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802,

804 (3d Cir. 1984) ("[W]hen a trial court decides an issue after it was properly submitted to a jury, it may deprive the non-moving party of his seventh amendment rights."); *Presidential Properties, Inc. v. Canto,* 615 F.2d 657 (5th Cir. 1980) (Trial court should not, under seventh amendment, tamper with verdict and grant judgment notwithstanding verdict upon Plaintiff's contention that jury committed error. . . .); *Lowenstein v. Pepsi Cola Bottling Co.,* 536 F.2d 9, 11 (3d Cir.), *cert. denied,* 429 U.S. 966 (1976).

Missouri Law on Fraud and the Eighth Circuit Decision [Questions II and III]

Under Missouri law, the elements of common-law fraud are a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that the representation be acted upon; the hearer's ignorance of the falsity of the representation; the hearer's reliance on the representation, and his right to do so; and damage. *Slater v. KFC Corp.,* 621 F.2d 932 (8th Cir. 1980); *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 562 F.2d 1040 (8th Cir. 1977), *cert. denied,* 435 U.S. 925.

Missouri courts recognize circumstantial rather than direct evidence is to be expected [See *Louis v. Andrea,* 338 S.W.2d 96, 103 (Mo. 1960); *Allison v. Mildred,* 307 S.W.2d 447, 453 (Mo. 1957)], and that fraud may arise from concealment. *Slater, supra; Feeney v. Cook,* 242 S.W.2d 524 (Mo. 1951); *Curtis v. Kays,* 670 S.W.2d 887, 893 (Mo.App. 1984).

The Court of Appeals affirmed the district court grant of judgment n.o.v. on grounds Woods failed to make a submissible case on four of the fraud elements: Misrepresentation, intent to induce action, reliance, and damages.

I. Misrepresentation (Representation and Its Falsity)

A. Evidence Relied On and conclusions reached by the Eighth Circuit Panel and Analysis thereof

Evidence Relied On	Analysis
1. The 8th Circuit stated, "The Manual expressly reserved the right to deviate from the otherwise standard procedure." (8th Cir. Op. p. 7).	1. The manual gave Newi the final authority to decide the Springfield affiliation matter (T. 240, 274-75, 572, 586, 864-65; V. 21-22). Newi concluded the affiliation should change in May/June 1985 (T. 274-75, 702, 745).
2. The 8th Circuit held that "[t]his theory [Woods' theory] disregards the realities of decision making in a hierarchal corporate management structure." (8th Cir. Op. p. 7).	2. What are these "realities of decision-making in a hierarchal corporate management structure" and how does the Eighth Circuit know them? Some organizations with a hierarchal management structure go by the book. ABC's top executive, Mr. Goldenson, certainly went by the book when, on getting Woods' personal plea for help, he kicked Woods' plea down the corporate ladder to

Kozak for a response (T. 187). Mandala, Newi's superior, certainly went by the book in acknowledging (T. 240, 572, 586) that the affiliation decision was Newi's "call".

ABC's Affiliation Policy Book was in evidence, the supposed "realities" were not. Who is to say that if "realities" exist, the jury did not understand them as well as the Eighth Circuit?

In going outside the evidence and relying upon "realities of decision-making in a hierarchal corporate management structure", the Panel misapprehended a material fact.

3. The 8th Circuit held, "Proof of subjective leanings of middlemanagement cannot establish that a corporate decision had occurred" (8th Cir. Op. p. 7-8).

3. Newi was ABC Television Network President; Mandala was President of ABC (Newi's superior); Kozak was ABC Vice-President in charge of Affiliate Relations. Newi was President of ABC Television Network, the person

charged, under ABC's Affiliation Manual, with deciding the issue. Newi was **Top Management.** Is the President of Buick, especially regarding Buick matters, *middle management* simply because, in the General Motors corporate structure there are management levels above him? "Middle management" is not a fact here, it is argument - and unsound argument, reflecting misunderstanding of a material fact.

4. The 8th Circuit concluded as a fact finder that "The undisputed evidence shows that ABC tabled the matter entirely until it reviewed the February 1986 ratings at the end of 1985." (8th Cir. Op. p. 8).

4. The evidence was the affiliate committee who under the Policy manual is to initiate the change with a recommendation did so in April/May 1985 (V. 129, 131, 158, 170) and never considered the matter again (V. 129, 131). The ultimate decision to switch was to be made by Newi (T. 240, 248, 274-75, 586, 864-65; V. 21-22, 162). Newi concluded that ABC should change

Springfield Affiliates in May/June 1985 (T. 274-75).

The criteria stated in the June 20 letter and directly repeated by Kozak were a sham. In April 1986, when ABC *announced* the decision, the undisputed evidence was that ABC had not even looked at the criteria and it did not know (and by inference, did not care) what technical improvements had been made by the stations or what operating changes had been made (T. 276-79, 316-18, 724, 730). (The June 20, 1985 letter stated ". . . We have decided to defer a decision. This will allow time for the parties to construct any improvement in facilities . . . and make any changes which they decide upon. It will also allow us to study the matter further. . ." (Woods' Ex. 54)). Are not actions, or the lack thereof, competent evidence?

Can a jury not reasonably decide that in fact, "actions do speak louder than words."

B. Evidence ignored or minimized by the Eighth Circuit

The 8th Circuit overlooked on denigrated evidence supporting Petitioner's theory and the jury's finding that the representation that Respondent had not decided in May/June '85 to switch affiliates in Springfield, was false:

Woods was told in a telephone conversation on June 4 (T. 324, 867) and in Mr. Kozak's letter of June 20, 1985, and in telephone conversations after receipt of the June 20th letter that ABC had made no decision (T. 146-147, 219, 782-783, 876).

In May 1985, ABC engineering staff made on site technical facilities inspections of KMTC and KSPR, but made no inspection in 1986 (T. 316-18, 724, 730, 859). The Committee met May 21, 1985 and reached an "overwhelming consensus to change affiliates" (V. 129, 131, 158, 170), and the Committee never met regarding Springfield in 1986 (V. 129, 131). There are no minutes or agendas for the May 1985 Committee meeting even though agendas and minutes were supposed to be prepared. ABC did have copies of the Committee meetings for the months before and the months after. Only the May meeting minutes were missing (V. 127-28, 144, 182; T. 273, 863). The Affiliation Contract Administration Director reviewed the KMTC contract in May 1985, under the manual, but not in 1986 (V. 140, 157-58). A preemption analysis of the two competing station owners was performed by ABC in 1985, but not in 1986 (T. 97, 98). ABC never checked out the changes and technical improvements that it told Woods would be the basis for its decision (T. 276-79, 316-18, 724, 730).

The decision was "Newi's call" (T. 240, 248, 274-275, 586, 864-865; V. 21-22, 162) and prior to July 1985 Newi decided the affiliation should be changed.

Mandala agreed it was Newi's call (T. 238, 241-42).

II. Intent to Induce Action

A. Evidence Relied On and conclusions reached by the Eighth Circuit and Analysis thereof

Evidence Relied On	Analysis
1. The Eighth Circuit found "ABC warned Woods in five letters and several phone conversations that the network was seriously considering switching the affiliation to KSPR." (8th Cir. Op. p. 9).	1. ABC in letters prior to the June 20 letter did warn Woods the affiliation could change. Woods heeded the warnings and told ABC he would not close the purchase until a decision was made, which ABC repeatedly assured him would be made shortly. ABC's counsel in closing argument and elsewhere characterized the prior letters as "red light" warnings (T. 924). But as Woods' counsel argued "red lights do turn green and warnings do expire" (T. 936). The June 20 letter and subsequent phone conversations were a green light, constituting a signal change.

2. The Court concluded as a matter of law "No jury could reasonably find that ABC intended the June 20 letter to induce Woods Television to purchase KMTC and make improvements."

2. ABC intended to and did induce Woods to reverse course and close the purchase of the station, rather than become a "glitch" that could snarl the FCC proceedings and the merger. ABC knew if Woods continued to refuse to close on the purchase of the station, lawsuits would follow. The June 20 letter was a deceitful plan to defer the unpleasantries until after the merger was complete. Is it merely coincidental that the "deferral period" stated in the June 20 letter matched the time frame within which the merger was to be completed? The ABC plan required time to pass and the excuse given was for station owners to make technical improvements, operating changes, and improve their ratings.

3. The Panel specifically held that "evidence is lacking to establish that ABC represented to Woods TV that the net-

3. Improvements, changes, and ratings take time to perform. Once again, the undisputed evidence was Woods and Mandala

work would base its decision only on the three criteria." (8th Cir. Op. p. 9, n. 6, paragraph 2).

testified the three criteria were to be the basis of the decision (T. 249-50). Nevertheless, ABC never again looked at what improvements or changes were made by the stations prior to announcing the switch in April '86 (after the merger was safely approved).

ABC was concerned about either KSPR or KMTC filing against the pending ABC/Capital Cities merger. To avoid getting either station mad and to induce action, keep the stations busy making improvements, ABC concealed the decision already made to switch affiliates, knowing the letter and assurances would induce action by Woods.

Is it not a legitimate inference that the June 20 letter was intended to buy time for ABC until after the merger was approved before announcing the switch? ABC encouraged im-

provements knowing such improvements would take time, and along with the phone conversations encouraged Woods to believe he could meet the criteria.

Intent is a fact question. Why is a three judge panel studying a cold record superior in making that decision to a six member jury who saw the witnesses and heard the testimony?

B. Evidence ignored or minimized by the Eighth Circuit

In a June 4, 1985 telephone conversation with Kozak, Woods said he wouldn't close the purchase of KMTC until ABC's decision was made (T. 324, 367). ABC had warned Woods that the affiliation could be in jeopardy and Woods heeded those warnings, refusing to close the purchase so long as ABC's position on the Springfield affiliation remained undefined (T. 120). Prior to receipt of Kozak's June 20 letter, Woods refused to close (V. 94). However, the June 20 letter and subsequent conversations led Woods to change his mind and close on July 17, 1985 (T. 121, 127, 128-129, 219).

Newi admitted that the June 20 letter was designed to lead the parties to make major improvements to the stations (T. 784). Kozak testified that he expected to receive telephone calls about the June 20 letter and, in

fact, he did receive calls from Charles Woods (T. 849, 875). Woods testified Kozak told him that ABC's decision would be based upon a comparison of technical improvements, operating changes and ratings during the "deferral period" at the two Springfield stations (hereafter referred to as the "three criteria" or "criteria") (T. 122-123, 127, 219).

Mark Mandala, in 1985 President of ABC Television, verified that criteria were put forth and were to be exclusive:

"Q. What were you waiting to give the stations an opportunity to do?

A. To exhibit performance, audience performance in the November sweep that was upcoming and to satisfy the technical needs, the technical improvements that each licensee was promising.

Q. I believe you mentioned that some criteria were recommended for this decision that was going to be made. Would those constitute the criteria?

A. Yes they would.

Q. So after this meeting, who drafted the letter that you mentioned setting forth the criteria?

A. I am assuming that Bob Kaufman drafted the letter. The reason for my assumption is that Mr. Erlick asked him to draft the letter."

(T. 249-250).

"Q. And that [June 20, 1985 letter] sets forth the criteria on which ABC was going to make the decision regarding switching affiliation?

A. Yes.

Q. Were there any other criteria that ABC was going to look at other than those mentioned in this letter?

A. Not that I am aware of."

(T. 250).

Woods was pleased that Kozak had finally defined, in objective terms, what would control ABC's decision (T. 127). Woods believed what he was told (T. 127). Woods felt that he could win on the basis of fair competition under the three objective criteria (T. 219-225). Based upon ABC's representations that no decision had yet been made and that, when it would be made it would be based upon performance under the three criteria, Woods purchased KMTC and spent millions of dollars improving the station, as ABC requested (T. 121, 127, 128-129).

ABC knew the June 20 letter would encourage Woods to spend millions on technical equipment and operating changes. Yet ABC never looked at those improvements (T. 316-18, 724, 730, 784).

An ABC shareholder meeting to approve the merger was scheduled for June 25, 1985 (Woods' Ex. 110-V), and the application for FCC approval was to be filed July 1, 1985 (T. 470). Erlick was concerned that an "affiliate flap" would cause an "unnecessary glitch" in securing FCC Approval (V. 10, 16).

To avoid the glitch or flap, Erlick instructed Kaufman to draft a letter to Woods and to KMTC and KSPR, for Kozak's signature, stating that the decision would be "deferred." (T. 247, 249-250). The letter was reviewed by Newi, Mandala and other network executives (Woods' Exhibit 53; T. 250, 704). Finally, Mr. Kozak signed and sent his letter of June 20, 1985 to Woods and the others outlining criteria on which the decision would be based (Woods' Exhibit 54; T. 250).

III. Reliance

A. Evidence Relied On and conclusions reached by the Eighth Circuit and Analysis thereof

Evidence Relied On	Analysis
1. The Eighth Circuit opinion cites one portion of Woods' testimony and the price reduction contract as evidence that Woods did not rely on the June 20 letter (8th Cir. Op. p. 10, quoting T. 124).	1. Without question, the cited testimony supports an inference Woods did not rely on the letter. ABC argued long and eloquently to the jury that was the correct inference to be drawn. The jury rejected the argument completely. There was other evidence; favorable to Woods. Charles Woods repeatedly testified that he would not have purchased KMTC for any price but for his belief, based on the June 20 letter and related phone conversations, that no decision had been made and that a decision, when made, would be based upon the criteria and fair competition, which he was willing to risk (T. 219, 225, 227, 249). The jury considered all the evidence and found for Woods. The verdict should be tested, not

by the evidence least favorable, but by the evidence most favorable to Woods. Otherwise stated, is there a conflict in Woods' testimony on transcript page 124 and on transcript page 127? Yes. The law has always been that conflicts or inconsistencies in testimony are resolved by juries, not judges. *Woodward v. Atlantic C.L.R.*, 57 F.2d 1019 (5th Cir. 1932). *See Bailey v. Central V.R., Inc.*, 314 U.S. 250 (1943). The unanimous jury resolved this conflict in favor of Woods. The 8th Circuit resolved it in favor of ABC. The 7th Amendment prohibits this type of re-examination of factual questions.

2. The Eighth Circuit panel also noted that in seeking financing for the purchase, Woods represented to a bank that the station would perform equally well as an independent (8th Cir. Op. p. 9).

2. Violence is done to all but the two cited items of evidence for the Court to conclude (P. 10): ". . . In light of the above factors, no reasonable jury could conclude that Woods relied on ABC's letter."

Can federal courts decide, not from the standpoint of admissibility but from the standpoint of probative value, what evidence a jury must accept, depriving parties of their right to a jury trial? Reliance is a fact issue and a jury question. *Total Petroleum, Inc. v. Davis,* 788 F.2d 476 (8th Cir. 1986). If other factors did, in part, influence Woods' decision, that does not defeat the claim. The jury was properly instructed under instruction 5 that its verdict required a finding only that the representation was material to Woods' purchase and improvements. Missouri cases have long recognized that it is not necessary that a misrepresentation be the "sole inducement" for Plaintiff's actions for reliance to be present. In *Jeck v. O'Meara,* 122 S.W.2d 897, 903-04 (Mo. 1938) the Missouri Supreme Court concisely stated the law: "It has been

held repeatedly that it is not necessary to show that false representations complained of were the sole inducing cause, but that it is enough if they were an effective cause along with other considerations; *that is, if they excited a material influence on Plaintiff's mind, although they constituted only one of several motives which acting together produced the result, it is sufficient*" (Emphasis added). Quoting, *Weston v. American National Ins. Co.*, 32 S.W.2d 789, 791-92 (Mo. 1930). *See also Manufacturers American Bank v. Stamatis*, 719 S.W.2d 64, 70 (Mo. App. 1986) ("It is not necessary that the representation be the sole inducement to act; it is sufficient if the representation is a material factor in the decision to act"); *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 636 (Mo. App. 1980). Could a

reasonable jury truly not find the $2 million spent to improve the station which increased its value as an independent by only $250,000 to be evidence of reliance?

B. Evidence ignored or minimized by the Eighth Circuit

Charles Woods testified:

Q. Let me ask this way, Charles. Why did you close? Why did you, after calling it off on June 7th, why did you go ahead and close with Mr. Meyer and undertake the operations and the technical changes?

A. Number of reasons. One is, of course, I believed what Mr. Kozak said.

Q. What do you mean you believed what he said, Charles?

A. If you make the technical improvements, have good ratings, operating improvements that we would keep the affiliation (T. 127).

On at least three other occasions, Woods confirmed that he relied on ABC's representations (T. 121, 128-129, 219). Woods spent approximately $2 million on improvements. As an independent station, that $2 million expenditure increased the value of the station by a mere $250,000.00 (T. 369). All the money spent on improving the news was wasted when the switch occurred, because once the station became an independent the news was discontinued (T. 351).

IV. Damages

A. Evidence Relied On and conclusions reached by the Eighth Circuit and Analysis thereof

Evidence Relied On	Analysis
1. Implicit in the 8th Circuit argument is that the price reduction addendum obviated any loss or damage Woods TV may have sustained.	1. The evidence established that Woods' "reliance damages" (improvments, expenses and programming changes which included purchase of programs to fill the void when ABC terminated the affiliation) totalled over $3.5 million (T. 346-347, 351-353, 354-355), and that Woods lost at least another $3 million on the value of the station (T. 368-369, 225). On the element of damages, there was an abundance of uncontroverted evidence to support submission of the case. *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1191. All the money spent on improvements, in

excess of the approximately $130,000 spent for additional equipment necessary to run the station as an independent (T. 352) after the affiliation was lost, was essentially wasted. Regarding the price reduction, Woods did what a good businessman should try to do - limit his contingent loss in the event he lost a fair competition. Can that, as a matter of law, defeat his claim and make jury findings unnecessary? The addendum reduced or mitigated damages but it did not eliminate them.

2. The court held, "Woods TV negotiated the addendum before it purchased the station to prevent it from suffering any injury at all. Thus the addendum was not a collateral source." (8th Cir. Op. p. 12).

2. The contract price reduction did not come from Defendant ABC/Capital Cities, and thus was collateral to the fraud-feasor, ABC. The law in Missouri is: "The Collateral Source Rule is recognized in our state, and a tort-feasor is not permitted to mitigate or reduce damages against him by

virtue of or as a result of his proving a plaintiff has received or will receive indemnity, compensation or restoration for a loss derived from some collateral source." *Blessing v. Boy Scouts of America,* 608 S.W.2d 484, 488 (Mo.App. 1980), citing *Iseminger v. Holden,* 544 S.W.2d 550 (Mo. banc 1976) *See also Collier v. Roth,* 434 S.W.2d 502, 506-07 (Mo. 1968); *Meyer v. Clark Oil Co.,* 686 S.W. 2d 836, 839-40 (Mo.App. 1984). In *Collier,* where the collateral source benefit was a contract adjustment with third parties, the Missouri Supreme Court explained: "We turn now to the argument that the Defendant is relieved of liability because the Plaintiff passed on its loss to its customers. The Court thinks this argument is invalid . . . The Plaintiff against whom a tort is committed has his cause of action at the

> moment the tort occurs. . .
>
> Things which happen later and let an injured Plaintiff escape some of the ultimate consequences of the wrong done to him do not inure to the benefit of the Defendant." 434 S.W.2d at 507.

B. Evidence ignored or minimized by the Eighth Circuit

Judy Breeding a certified Public Accountant and Partner with Baird, Kurtz and Dobson, a regional CPA firm since 1973, testified that the expenditure of nearly $2,000,000 for new equipment increased the value of KMTC between July 1985 (the closing date) and October 1986 (termination as an ABC affiliate) as an independent only $250,000 (T. 368-69).

Frederick Michael Lipps, a Woods' employee, introduced purchase orders and cancelled checks for improvements made from the time Woods purchased KMTC until April 4, 1986 (Woods' Exhibit 117-20). He introduced income statements and a summary of improvements and expenditures (Woods' Exhibit 121, 123), which included $1,255,970.85 for the transmitter, tower, and antenna (T. 346), $162,162.92 for technical equipment improvements made to the news department (T. 347), $348,465.84 on news operating expense which was discontinued when the station became an independent (T. 351), over $100,000 in additional equipment while still the affiliate (T. 352), and over $130,000 in additional equipment which was necessary to run the station as an independent (T. 352).

Mr. Woods testified as follows:

"Q. . . . What were you going to be out if the affiliation was taken, by virtue of owning an independent station?

A. It's very difficult to calculate, but it would be a great deal of money, because you would have to take $8,000,000, add $2,000,000 worth of improvements to it, $10,000,000 for a station that would be worth maybe a third of that." (T. 225).

Trial practice should not be permitted to deteriorate to the point that jury verdicts are allowed to stand only if the judge concurs. What better message could be sent than that the right to trial by jury is so precious that encroachments, even at the highest level of the judicial system will not pass unnoticed and uncorrected.

WHEREFORE, the Supreme Court should grant the Petition for Writ of Certiorari and take the case to right the injustice done by the Eighth Circuit in affirming the district court; and to protect the Seventh Amendment right to trial by jury.

DANIEL, CLAMPETT, LILLEY, DALTON,
POWELL & CUNNINGHAM
By: GARY R. CUNNINGHAM
P. O. Box 10306 G.S.
Springfield, MO 65808
(417) 882-9600

CERTIFICATE OF SERVICE

The pleading was served upon all attorneys of record for each of the parties to this action and all parties not represented by counsel, by mailing copies to him, as prescribed by law.

On this 13th day of July, 1989.

GARY R. CUNNINGHAM

APPENDIX

(Filed June 10, 1988)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
SOUTHERN DIVISION

No. 86-3396-CV-S-4

CHARLES WOODS TELEVISION CORPORATION,
Plaintiff,

vs.

CAPITAL CITIES/ABC, INC.,
Defendant.

ORDER

Plaintiff, Woods Television Corp., brought this action against defendant, ABC, alleging that ABC represented to Woods that no decision had been made concerning the continuation of the ABC affiliation in May, 1985. Plaintiff further alleged that ABC had made a decision to switch affiliates in May 1985 and that plaintiff was damaged by the misrepresentation. The case was tried to a jury which rendered a verdict in favor of plaintiff. Now pending before the Court is plaintiff's motion for a judgment notwithstanding the verdict or in the alternative a new trial.

Defendant moved for a directed verdict at the close of plaintiff's case and renewed the motion at the end of defendant's case. The Court is of the opinion that a

directed verdict should have been granted in favor of defendant. On the basis of evidence in the case, notwithstanding the jury verdict against it, the defendant is entitled to a judgment in its favor. Therefore, the Court will order the judgment in favor of plaintiff to be set aside and judgment entered for defendant.

The standard for ruling a motion for judgment notwithstanding the jury verdict is clearly set forth in the case of *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976). The standard is (1) to consider the evidence in the light most favorable to the plaintiff as the party prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiff; (3) to assume as true all facts which plaintiff's evidence tends to prove; (4) to give plaintiff the benefit of all favorable inferences which may reasonably be drawn from the facts provided; and (5) to deny the motion if reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it. A directed verdict or a judgment notwithstanding the verdict should be granted only "when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party." *SCNO Barge Lines, Inc. v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192-93 (8th Cir. 1984) (citations omitted).

Defendant has moved the Court that in the alternative, a new trial be granted. Fed.R.Civ.P. 50(c) requires the district court granting a motion for a judgment NOV to rule conditionally on a party's motion for new trial. In a diversity case, the question of whether a new trial is to be granted is a federal procedural question and is to be decided by reference to federal law.

Pitts v. Electrostatic Finishing, Inc., 607 F.2d 799, 802 (8th Cir. 1979). A district court can set aside a jury verdict where it determines that the verdict is against the clear weight of the evidence. In making such a determination, the district court can rely on its own reading of the evidence—it can "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *Ryan by Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984).

The district court's discretion in setting aside a verdict as against the weight of the evidence is not unlimited, however, and the jury verdict should be disturbed only to prevent a miscarriage of justice. The Court should not "substitute its judgment for the jury's, granting a new trial whenever it would find differently than the jury has." *Id.* The Court should reject the jury's verdict only where, after a review of all the evidence giving full respect to the jury's verdict, the Court is left with a definite and firm conviction that the jury has erred. For the following reasons, in the very least it is clear that the jury verdict against the defendant in this matter is against the greater weight of the credible evidence in this case. In fact, the evidence is so strong that a judgment notwithstanding the verdict must be granted. In the alternative, the defendant will be granted a new trial.

The facts of this case have been set out in detail in prior orders, however, a brief synopsis is necessary to explain this decision. Prior to December 1984, KMTC was an ABC affiliate. Affiliation agreements last for two years. By federal statute, the agreements cannot be longer and are cancelable by either party on six months written notice:

> *Term of affiliation.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original terms, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than 2 years: *Provided,* That a contract arrangement or understanding for a period up to 2 years may be entered into within 6 months prior to the commencement of such period. 47 C.F.R. § 73.658(c).

ABC renewed its affiliation with KMTC effective January 1985. In December, 1984 and January, 1985 plaintiff and KMTC entered into a contract for plaintiff to purchase KMTC. The affiliation assignment must be approved by the network. Around that same time an independent station, KSPR, became interested in obtaining the ABC affiliation and requested an opportunity to make a presentation. ABC informed all parties of the request, scheduled times for presentations of KMTC and KSPR, sent an affiliation policy book of the selection criteria to plaintiff, and evaluated the stations internally.

In the initial letter to plaintiff and KMTC dated February 15, 1985 ABC stated that it would entertain KSPR's presentation and invited both the current KMTC owner and plaintiff to make a presentation. Plaintiff's sole owner, Charles Woods, stated that the letter of February 15 caused him concern; that affiliation renewals are usually routine; and that it indicated to plaintiff that ABC was putting the affiliation up for grabs. One month later, on March 15, 1985, defendant responded to plaintiff's request for ABC's position regarding the ABC

affiliation. ABC reiterated its position that no response could be made until the presentations of both stations were evaluated. At that time, the policy book was provided to plaintiff. The presentations of both stations occurred in March and April of 1985.

Plaintiff does not contend that any misrepresentation occurred up to that date. It is undisputed that an affiliation committee meeting occurred in May 1985. According to every witness, the committee was impressed with the KSPR presentation. Only one department, the engineering department, was in favor of retaining KMTC as the affiliate. However, the president of ABC television, George Newi, was not present at the affiliate review committee meeting, but was provided with a report by the vice-president of affiliate relations, Richard Kozak. Kozak and Newi then met with the president of ABC Network, Mark Mandela, to discuss the affiliation switch. After input from Erlich, a member of the board of directors and legal counsel, defendant maintains that the affiliation decision was deferred; plaintiff maintains that the decision to switch was made at that meeting but the announcement was deferred. It is unclear on what date the meetings with Erlich occurred but it was sometime in May or June.

By letter dated May 28, 1985 ABC agreed to the assignment from KMTC to Woods, but stated "If, after full consideration, we decide to change affiliation in Springfield, it would be pursuant to Section VI of that agreement, which gives either party the right to terminate on not less than six months prior written notice." One month later on June 20, 1985, ABC sent another letter to plaintiff stating that ABC had "decided to defer a decision on future affiliation in Springfield for at least

the balance of 1985." Mr. Woods and Kozak had a phone conversation around that time. Charles Woods was alarmed enough to begin negotiations to get his deposit back. He contacted his broker, Bruce Houston, who suggested a price reduction as a means of closing the sale. Plaintiff negotiated a $5 Million Dollar price reduction in the event of an affiliation termination prior to July 1986. At that time Mr. Woods also informed the bank that the affiliation with ABC was in jeopardy. In that regard, Woods provided projections of the changes in debt and operating income if the station were to become an independent. The bank approved his loan based on plaintiff's projections and its own worst case scenario. Charles Woods closed on the purchase on July 17, 1985. The issues before the Court then are whether plaintiff met its burden of proof that defendant defrauded plaintiff.

The Missouri Supreme Court plainly has set forth the elements of a fraud claim under Missouri law:

> The elements of fraud are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his ignorance of its truth, (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his right to rely thereon, and (9) the hearer's consequent and proximately caused injury.

Country Shindig Opry, Inc. v. Cessna Aircraft Co., 780 F.2d 1408 (8th Cir. 1986) *quoting Sofka v. Thal*, 662 S.W.2d 502, 506 (Mo. banc 1983).

A failure of proof on any one element requires that judgment be entered for the defendant. *Modern Enter-*

prises, Inc. v. Allen, 802 F.2d 312, 313-14 (8th Cir. 1986). See also, *Simcuski v. Saeli,* 406 NYS2d 259, 265, 377 N.E. 2d 713, 44 N.Y.2d 442, 453 (N.Y. 1978). Defendant contends that plaintiff failed as a matter of law to prove misrepresentation, reliance or damages. The Court agrees and further finds that there was no evidence of ABC's intent that the representation be acted on by Woods and in the manner reasonably contemplated. There was no evidence that ABC preferred plaintiff rather than Meyers to own the station. The evidence is to the contrary; defendant tried to keep plaintiff informed of the affiliation risk.

As to the element of falsity of the representation, the plaintiff failed to show that ABC, the corporation itself, made the decision to change affiliations. The critical question is "when is a decision a decision of the corporation?" Plaintiff maintains that the person with the power to make a decision to change affiliates did make the decision to switch. However, it is undisputed that Newi, the president of the network, chose to go up the corporate chain for further input. Even if you accept plaintiff's premise that Newi made the decision to switch affiliates, the fact remains that someone with more authority than Newi did not allow him to act on that decision. In other words, that "decision" to switch was not the actual "decision" of ABC. ABC's motive for not making a corporate decision is immaterial. The change in affiliation was not acted upon and even if a mental decision was made, it could have been changed at any time. In fact, ABC was in buy-out negotiations with Capital Cities and several people who were in on the alleged decision were no longer with ABC six months later or were demoted—including Newi, Mandela, and Kozak.

There was no evidence that ABC did anything to change its position so that KMTC could not remain the affiliate nor was KSPR notified of the switch of affiliation. Plaintiff is seeking to hold ABC liable for its internal decision-making process. ABC had no duty to inform a prospective purchaser, the plaintiff, of any of its internal discussions and cannot be held legally liable for engaging in that decision-making process. It is a corporate decision when the corporation takes all the steps it deems necessary to make a decision. The fact that the corporate officers did not precisely follow their affiliation book guidelines does not invalidate the corporate decision. Plaintiff failed to prove a fraudulent representation.

More importantly, the Court finds a failure of proof that the plaintiff relied on the representation. The issue in this case is whether or not any decision had been made by ABC, not whether ABC had decided to switch affiliates. It is clear ABC had an absolute right to switch affiliates and to do so with six months notice. The Court is convinced that had ABC announced "we have made a decision about the affiliation, but we will not announce it until 1986" that plaintiff would have acted in precisely the same manner as it did with the announcement that no decision had been made. Mr. Woods exercised his considerable business judgment to negotiate a $5 Million Dollar reduction in price. His staff supplied projections for the Bank of America to use in assessing a loan amount. Mr. Woods relied on the "custom of the industry" and his standing in the television industry in his efforts to win the ABC affiliation.

As stated in the "Lorimar" case, by July 17, 1985 plaintiff was fully aware that the ABC affiliation was "up for grabs." Plaintiff had direct notice at least five times

that any "custom" would not be controlling in this particular affiliation. Additionally, although plaintiff stated to the contrary in previous summary judgment motions, plaintiff did not show any representations made after the July 17, 1985 closing date. Therefore, plaintiff's mere assertion at trial that he would never have bought an independent station had ABC not misrepresented its true decision is contradicted by the evidence. Plaintiff would and did buy a station in which he was 99% sure he would get the affiliation.

Nor is plaintiff's after trial assertion that plaintiff relied on the ABC's representation that no decision had been made supported by the evidence. Mr. Woods stated at the trial that he was not going to purchase the station after ABC's June 20th letter announcing a deferral of a decision until the end of 1985. Plaintiff in its brief correctly states that it was *after* the June 20th letter that plaintiff purchased the station, but there was no causal connection between the letter and the purchase of the station. Mr. Woods contacted the broker, Mr. Houston, to tell him the sale was in jeopardy. Mr. Houston suggested the contingency price reduction. According to witness Wattner, Woods insisted on the contingent price reduction stating that the reduction was at the bank's insistence. It is clear that Mr. Woods personally assessed the affiliation situation, took a calculated risk (a 99 to 1 gamble) and lost. Having full knowledge of the jeopardy of the ABC affiliation, and using that knowledge to bargain a reduction in price with the KMTC owners, the plaintiff's claim cannot stand. See, *Port Chester Yacht Club v. Port Chester*, 507 N.Y.S.2d 464, 465 (A.D. 2 Dept. 1986). Woods did not rely on anything ABC said in his purchase.

Additionally, plaintiff failed to prove that it suffered damages from any representation of ABC. First of all, damages must be proximately caused from the representation. In this matter, damages were alleged stemming from purchase of the television station and from the improvements on the television station. Plaintiff failed to show damages on either count that were caused by the representations of ABC. As to the purchase of the station, plaintiff contracted to buy KMTC prior to any contact with ABC. Plaintiff was obligated to buy the station before any representations. Plaintiff contends that it could have gotten out of the contract, but this Court does not need to address that issue. On the issue of damages in this case, the purchase of the station was not proximately caused by ABC's representations. Even if the representations did cause the plaintiff to purchase the station, Woods himself set the value as an independent station in the addendum to the purchase agreement. He made projections to the bank based on the information within his knowledge at the time. He now wants to base damages on the actual record of the station as an independent. Mr. Woods, a leader in the television industry for 30 years, set the fair market value of the station at the time of purchase. He paid what he thought it was worth. The Court cannot undo his bad bargain.

As to the improvements, Mr. Woods promised to make improvements prior to any representation by ABC. He subsequently obligated himself by contract to the seller to make the improvements. Again, plaintiff contends he could have breached those contracts for improvements. Whether that is true or not, the point is plaintiff made those improvements in hopes of getting the ABC affiliation. The representations of ABC in no way induced the technical improvements. Therefore, the jury verdict

awarding damages to the plaintiff cannot stand. Likewise, without any liability basis for actual damages, punitive damages are improper.

Plaintiff makes an eloquent statement in favor of jury verdicts. The Court is in complete agreement on the importance of the jury system; however, the burden is upon the plaintiff to prove a legal wrong. The Court must assume the jury resolved all conflicts in the evidence; however, there were no conflicts in the evidence concerning ABC's "decision." Plaintiff uses the mere fact that ABC did not use the procedures outlined in the affiliation handbook to show fraud. There was no conflicting testimony that any decision was made nor any other allegations of fraudulent activity. Plaintiff is correct that fraud for the most part has to be established by a number and variety of circumstances. See, *Rogers v. Hickerson,* 716 S.W.2d 439 (Mo. App. 1986). The problem in this case is that plaintiff failed to show a number and variety of circumstances establishing fraud. A review of plaintiff's list shows only that the personal preference of several ABC officials was for KSPR and that high level ABC executives were consulted on this matter. Those facts do not make a fraud case.

Plaintiff's reference to concealment is completely misguided. Plaintiff assumes in its pleading that defendant had a duty to disclose its affairs to plaintiff. There is no support in the law for that position. Plaintiff and defendant had no relationship with regard to KMTC prior to plaintiff closing on the station in July 1985. Defendant had no obligation to plaintiff as a prospective purchaser. Defendant could have refused the assignment from Meyers to plaintiff for whatever reason. As stated in this Court's prior orders, the plaintiff would be given an opportunity

at trial to show misrepresentations after July 17, 1985. The plaintiff did not do so.

Likewise, there is no merit to plaintiff's contention that different criteria were used to select the affiliate than had been announced by ABC. Plaintiff is seeking redress for what it considers to be the wrong decision by defendant. There was no evidence that defendant represented that only three criteria would be used to evaluate the affiliates. In the June 20th letter, ABC states "all the facts and circumstances;" in the May 29th letter, ABC uses the phrase "full consideration;" the February letter invites a presentation by all parties and sends an affiliation booklet which refers to ten factors plus such "additional studies as ABC may consider necessary to reach a decision;" the March letter indicated the importance of the presentations and the affiliation booklet; and the June 3rd letter referred plaintiff to the May 28th letter and stated the affiliation would be chosen on its own merits. There is simply no conflicting evidence in the record that defendant represented that only three criteria would be used in the affiliation decision. Therefore, it is completely irrelevant what considerations defendant did use in its evaluation. ABC was free to use any lawful criteria in its decision.

The Court finds that the plaintiff failed in three respects to provide a submissible case on the issue of fraud. In the alternative, the Court grants a new trial for two reasons. First, the verdict is against the weight of the evidence as explained above. Second, the jury instruction submitted by plaintiff omitted the element of rightful reliance. The right to rely was at issue in this trial and that issue should have been submitted to the jury.

For these reasons, the judgment entered against defendant and in favor of plaintiff will be set aside. The

evidence at trial overwhelmingly demonstrates that defendant made no misrepresentation, that plaintiff did not in fact nor would a reasonable person rely on any representation of defendant and that plaintiff suffered no damages caused by the representation. Accordingly, it is hereby

ORDERED that the verdict in favor of plaintiff shall be set aside by this Court and plaintiff's motion for judgment notwithstanding the verdict is granted; and it is further

ORDERED that in the alternative plaintiff's motion for a new trial is granted.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: June 10, 1988

(Filed March 16, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2036

Charles Woods Television Corp.,
Appellant,

v.

Capital Cities/ABC, Inc.,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 14, 1988
Filed: March 16, 1989

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Plaintiff-appellant Charles Woods Television Corporation (Woods TV) recovered a jury verdict of $3.5 million ($1.5 million actual damages plus $2 million punitive damages) resting on fraudulent misrepresentations allegedly made by defendant-appellee Capital Cities/ABC, Inc. to induce Woods TV to purchase and improve a

television station then affiliated with the American Broadcasting Company (ABC).[1] Woods TV brought this action after ABC cancelled the affiliation. The district court,[2] however, rejected the jury verdict and granted appellee's motion for judgment n.o.v., or in the alternative, its motion for a new trial. From the adverse judgment, Woods TV brings this appeal, alleging that the trial court erred in setting aside the verdict and entering judgment for Capital Cities/ABC based on the court's determination that Woods TV failed to create a submissible case of fraud under Missouri law. Woods TV also questions on appeal certain evidentiary rulings of the trial court. For the reasons discussed below, we affirm the judgment.[3]

I. BACKGROUND

Television station KMTC in Springfield, Missouri, became an ABC affiliate in 1966. Federal regulations provide that affiliation agreements between networks and local stations cannot exceed two years and that either party may cancel an agreement upon six months' written notice. 47 C.F.R. § 73.658(c) (1987). ABC renewed KMTC's affiliation agreement without interruption through a renewal that became effective in January 1985.

On January 11, 1985, Woods TV signed a contract to purchase KMTC from Midland Television Corporation

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1. The primary alleged misrepresentation occurred in June 1985. On January 3, 1986, ABC merged with Capital Cities and became a wholly owned subsidiary of that corporation. Thus, when Woods Television brought this action later that year, it sued Capital Cities.

2. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

3. In light of our disposition, we do not address Woods TV's claim that the trial court erred in granting a new trial as a lesser alternative to the judgment n.o.v. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2540, at 618 (1971).

(Midland) at a later date for $13 million. The affiliation agreement between ABC and KMTC required that the network approve all assignments of affiliations to purchasers such as Woods TV. In a letter dated February 15, 1985, however, ABC informed Woods TV and KMTC that Telepictures Corporation (Telepictures) had asked to make a presentation to ABC in hopes of obtaining the Springfield affiliation for KSPR, an independent station Telepictures had recently purchased. The network invited both KMTC and Woods TV to make a presentation for retaining the affiliation, and transmitted to both parties an official policy book that outlined the network's criteria for evaluating competing applicants.

Charles Woods (Woods), the president and sole owner of Woods TV, testified at trial that he became concerned after reading the February 15 letter. While he understood that networks usually renew affiliation agreements routinely, ABC appeared to be putting the Springfield affiliation up for grabs. Woods requested ABC's position on KMTC retaining the affiliation, but Richard Kozak, ABC's vice president for affiliate relations, responded in a letter dated March 15, 1985, that the network could not state its position until after it had evaluated the competing presentations.

The ABC Affiliation Policy Book, which was introduced into evidence at trial, outlines the procedure the network generally follows in deciding whether to switch affiliates. First, the vice president for affiliate relations evaluates the presentations, ratings data and engineering reports, and thereafter submits a recommendation to the Affiliation Review Committee. This committee, composed of representatives from various network departments, then reviews the matter and makes a formal recommendation

whether the network should switch the affiliation. The vice president for affiliate relations delivers the committee's recommendation to the president of the ABC Television Network, who has authority to make the final decision.

KMTC and KSPR each delivered presentations to the Affiliation Review Committee in April 1985. The committee met on May 21 to discuss the proposals. By all accounts, the committee members stated that KSPR gave a superb presentation. Although most members leaned toward switching the affiliation to KSPR, the engineering department favored remaining with KMTC. The committee tabled the decision without taking a formal vote.

Kozak then reported to George Newi, the president of the ABC Television Network, a subsidiary of ABC Television, that the committee was leaning strongly toward changing affiliates. While Newi tended to agree with the switch, he decided to discuss the matter first with his immediate superior, Mark Mandala, the president of ABC Television. Mandala in turn suggested that he, Kozak, Newi, and Robert Kaufman, a network attorney and committee member, meet with Everett Erlick, an executive further up the chain of command who served as ABC's general counsel and as a member of the network's board of directors. At this meeting, Erlick recommended that Newi and Kozak defer any final decision on the Springfield affiliation, and they concurred. Although the exact date of the meeting is unclear, it occurred sometime in May or June of 1985.

ABC granted written approval to the assignment of the affiliation from KMTC to Woods TV on May 28, 1985. The network reiterated, however, that it still was consid-

ering a switch of stations and that it reserved the right to terminate the affiliation upon six months' notice. After receiving this letter, Woods called Kozak and said that he planned not to close the purchase of KMTC because the affiliation remained in doubt.

On June 20, 1985, Kozak sent a letter to Woods, Telepictures, and KMTC's president Kenneth Meyer stating that the network had decided to defer a decision on the affiliation switch for at least the rest of 1985. Woods, nevertheless, closed the purchase of KMTC on July 17, 1985, after negotiating a $5 million price reduction in the event that ABC terminated the affiliation before July 1986. After Woods purchased the station, he changed its call letters to KDEB. ABC terminated KDEB's affiliation on April 3, 1986.

Thereafter, Woods TV filed this suit for fraud in Missouri state court, and Capital Cities/ABC removed the action to federal court on diversity grounds under 28 U.S.C. §§ 1332 and 1441. After a six-day trial, a jury awarded Woods TV a total of $3.5 million, including compensatory damages and punitive damages. Capital Cities/ABC then moved for judgment n.o.v., or alternatively for new trial, on the grounds that Woods TV had failed as a matter of law to establish the elements of fraud under Missouri law. The trial court granted the motion. This appeal by Woods TV followed.

II. DISCUSSION

A. Judgment N.O.V.

Woods TV's fraud claim focuses on an allegation that ABC misrepresented the true facts when it stated in the June 20 letter that the network had not decided yet

whether to switch the affiliation to KSPR.[4] Woods TV contends that ABC already had decided to switch, but deferred announcing the decision because it feared possible litigation that could cause a "flap" or "glitch" in the pending Federal Communications Commission (FCC) approval of the merger of ABC and Capital Cities. In addition, Woods TV argues that it relied on the representation that the affiliation decision remained open when it purchased KMTC and improved the station's facilities and programming.

Under Missouri law, a plaintiff alleging fraud must establish the following elements:

> 1) a representation, 2) its falsity, 3) its materiality, 4) the speaker's knowledge of its falsity, or his ignorance of its truth, 5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated, 6) the hearer's ignorance of the falsity of the representation, 7) the hearer's reliance on the representation being true, 8) his right to rely thereon, and 9) the hearer's consequent and proximately caused injury.

Country Shindig Opry, Inc. v. Cessna Aircraft Co., 780 F.2d 1408, 1411 (8th Cir. 1986) (quoting *Sofka v. Thal*, 662 S.W. 2d 502, 506 (Mo. 1983) (en banc)). A failure to make a submissible case on any one of the elements defeats the

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4. In the June 20 letter, Kozak stated in pertinent part:

> We have decided to defer a decision on future affiliation in Springfield for at least the balance of 1985. This will allow time for the parties to construct any improvements in facilities with which they may elect to go forward and to make any changes which they may decide upon. It will also allow us to study the matter further and give us the opportunity to examine the November rating books. We will evaluate the situation again in early 1986 in light of all the facts and circumstances at that time.

entire claim. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1218 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

Although a party alleging fraud under Missouri law may establish each element with circumstantial evidence, that proof must rest on "something more substantial than suspicion, surmise, and speculation." *Glass Design Imports, Inc. v. Import Specialties*, Nos. 87-2703, 88-1078, slip op. at 7 (8th Cir. Feb. 14, 1989). "[A] party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith." *Craft*, 766 F.2d at 1218. In addition, "[t]he language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used." *Id.* at 1220.

In this case, the trial court granted judgment n.o.v. because it decided that Woods TV had failed to make a submissible case on four elements of fraud: misrepresentation, intent to induce action, reliance, and damages. In reviewing this determination, we must apply the same standard as the trial court. *Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1407 (8th Cir. 1987). A judgment n.o.v. should be granted only when the evidence, viewed in the light most favorable to the prevailing party, "points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party." *Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1248 (8th Cir. 1987). Based on the record before us, we affirm the grant of judgment n.o.v. in this case.

1. Misrepresentation

The June 20 "no decision" letter from Kozak to Woods constituted a misrepresentation only if ABC at the time already had decided to switch the affiliation to KSPR.

At trial, Woods TV introduced evidence that Newi, Kozak, and the committee favored the switch in May 1985. The ABC policy manual in evidence granted Newi authority to make the final decision. Thus, Woods TV argues that the jury could determine that ABC had effectively made a final decision to switch before sending the June 20 letter.

This theory emphasizes the procedure outlined in the policy manual, but in that manual the network also expressly reserves the right to deviate from the otherwise standard procedure. Moreover, this theory disregards the realities of decisionmaking in a hierarchal corporate management structure. The evidence establishes that although Newi and Kozak favored the switch, on the advice of one of their superiors, Everett Erlick, they deferred making a decision. The policy manual did not prevent them from seeking the advice of a superior. Proof of the subjective leanings of middle management in May cannot establish that a corporate decision had occurred before June 20.

Woods TV argues that Erlick effectively vetoed the switch solely because he feared that potential lawsuits by Woods TV, KMTC or Telepictures might cause a "flap" or "unnecessary glitch" in the pending FCC approval of the merger of ABC and Capital Cities. Even if the merger to some degree motivated Erlick to recommend deferral, ABC's motivation for its actions does not establish that the network in fact had made a final decision in June 1985. The fear of litigation just as easily could have caused the network to defer making any decision at all at that time.

The undisputed evidence shows that ABC tabled the matter entirely until it reviewed the November ratings at the end of 1985. Because these ratings proved inconclusive, ABC waited for the February 1986 ratings before reviewing the matter again.

In March and early April of 1986, the research and engineering departments submitted further reports comparing the ratings and facilities of KDEB and KSPR. Based on these reports, and spurred by Woods' further requests for a decision, Newi sent Mandala a formal recommendation on April 3, 1986, that ABC switch the affiliation. Mandala approved the recommendation that day, and Newi called Woods TV to announce the decision.[5]

In light of this undisputed evidence, the district court correctly determined that no reasonable jury could conclude that ABC made a false representation when it stated in the June 20 letter that the network had not decided whether to switch affiliates.[6]

While the foregoing discussion is dispositive, we nevertheless briefly comment on the failure of proof upon other elements necessary for Woods TV to have made a submissible case of fraud.

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5. After ABC merged with Capital Cities in January 1986, Capital Cities drastically reduced the size of the Affiliate Relations department. As part of this restructuring, the company released Kozak. Newi assumed Kozak's duties, while Mandala assumed Newi's former position.

6. Woods TV also argues that ABC committed fraud by "concealment" and by misrepresenting that the network would base its decision solely upon the criteria of technical improvements, operating changes, and ratings. These theories, however, were not before the jury and therefore "may not provide the basis for upholding the jury verdict." *Country Shindig Opry, Inc. v. Cessna Aircraft Co.*, 780 F.2d 1408, 1412-13 (8th Cir. 1986).

Even if these theories were properly before us on appeal, we would find them to lack merit. First, because ABC had not made a decision in June 1985, it had nothing to conceal. Thus, the concealment claim and the misrepresentation claim seem to be one and the same. If the verdict will not stand on misrepresentation, it cannot stand on concealment. Further, evidence is lacking to establish that ABC represented to Woods TV that the network would base its decision only on the three criteria. The June 20 letter clearly informed Woods TV that the decision would be based on "all the facts and circumstances."

2. Intent to Induce Action

No jury could reasonably find that ABC intended the June 20 letter to induce Woods Television to purchase KMTC and make improvements. To the contrary, ABC warned Woods in five letters and in several phone conversations that the network was seriously considering switching the affiliation to KSPR.

3. Reliance

Woods TV also failed as a matter of law to prove it relied on ABC's alleged misrepresentations in buying the station and making improvements. The undisputed evidence shows that ABC's repeated warnings of a potential switch caused Charles Woods to inform Kozak that Woods TV no longer planned to close the purchase of KMTC. Woods decided to go ahead and close the transaction only after he, at the suggestion of a broker, negotiated an addendum to the purchase agreement whereby Woods TV would receive a $5 million reduction in the price of the station if ABC terminated the affiliation. As Woods testified at trial:

> Q Upon receipt of [the June 20] letter, what did you decide to do?
>
> A I still was not going to buy the station because the affiliation was still in doubt.
>
> Q But with regard to closing, did you buy the station?
>
> A Yes. We bought the station.
>
> Q Why did you buy the station?
>
> A Sometime after this letter, the broker, Mr. Houston, got in touch with me, and he proposed some

> type of a plan whereby in the highly unlikely event that we didn't get the affiliation agreement—if it were canceled—there would be a reduction in price on the station.

Tr. 124.

According to that evidence, in deciding to close the deal and purchase KMTC, Woods relied not on the June 20 letter, but on his own business judgment that the price reduction he negotiated would protect him from the known risk that the station could lose the affiliation. *See Empire Gas Corp. v. Small's LP Gas Co.*, 637 S.W.2d 239, 243-44 (Mo. App. 1982). We also note that in seeking financing for the purchase, Woods represented to a bank that the station would perform equally well as an independent. In light of the above factors, no reasonable jury could conclude that Woods relied on ABC's letter.

B. Evidentiary Issues

Woods TV also contends that the district court erred in (1) excluding testimony about conversations ABC officials had with outside counsel concerning the effect of a switch on the pending merger and (2) permitting the jury to consider the price adjustment addendum to the purchase agreement. We may not disturb these evidentiary rulings "absent showings of abuse of discretion and resulting prejudice." *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1207 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982). Under this standard, no abuse of discretion or prejudice occurred in this case.

The trial court properly excluded on the grounds of attorney-client privilege testimony by Newi concerning a phone call ABC officials placed to the network's out-

side counsel for the pending merger to discuss the effects of a possible affiliation switch. Contrary to Woods TV's assertion, this communication did not fall within the narrow exception to the privilege doctrine for cases in which a defendant attempts to use the privilege to conceal fraud. *See* Mo. Rev. Stat. § 491.060(3) (1949 & Supp. 1989). The exception does not apply here because Woods TV failed to make a prima facie showing that ABC communicated with outside counsel in furtherance of a fraud and that the communication bore a close relationship to the fraud. *Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 281-83 (8th Cir. 1984), *cert. denied,* 472 U.S. 1022 (1985). Moreover, this information tended only to establish ABC's motives for its actions —a point that bears little relevance to the real issue of whether ABC already had decided to switch before June 20, 1985. *See supra* p.8.

Furthermore, Woods TV's argument that ABC waived the privilege at trial also lacks merit. Although the network's witnesses testified generally about the effects of the merger, they never mentioned the particular communication in question. Finally, even if exclusion of the testimony as privileged constituted error, no prejudice occurred because Woods TV presented substantial other proof of ABC's motives.

The district court also did not abuse its discretion in permitting the jury to consider the addendum to the purchase agreement. Woods TV incorrectly asserts that the "collateral source" rule precludes admission of the addendum. That rule, however, only prevents a tortfeasor from reducing or mitigating the damages against him by proving the plaintiff has received indemnity or compensation payments from an independent, collateral

source for the injury caused by the tortfeasor. *See Iseminger v. Holden,* 544 S.W.2d 550, 552 (Mo. 1976) (en banc); *Spengel v. Kantor,* 736 S.W.2d 51, 52 (Mo. App. 1987). In this case, Woods TV negotiated the addendum before it purchased the station to prevent it from suffering any injury at all. Thus, the addendum was not a "collateral source."

Additionally, ABC introduced the addendum not only on the damages issue, but to prove that Woods TV did not rely on the representations. As noted above, the addendum is highly probative on the reliance issue, and thus is not "collateral" to the fraud claim. Therefore, the collateral source rule does not apply. *See Burrous v. American Airlines, Inc.,* 639 S.W.2d 263, 266 (Mo. App. 1982).

III. CONCLUSION

We affirm the judgment of the district court granting Capital Cities/ABC's motion for judgment n.o.v.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(April 20, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2036WM

Charles Woods Television Corp.,
Appellant,

vs.

Capital Cities/ABC, Inc.,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Appellant's suggestion for rehearing en banc has been considered by the Court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

April 20, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.